Issue: Qualification/misapplication or unfair application of state policy – discrimination because of LTD; Access/to grievance process to challenge her movement into LTD non-working; Ruling Date: June 27, 2005; Ruling #2005-1006; Agency: Department of Corrections; Outcome: grievant has access; issues are qualified for hearing

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND ACCESS RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2005-1006
June 27, 2005

The grievant has requested a ruling on whether her January 14, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that the agency misapplied or unfairly applied state policy and discriminated against her when it placed her on long-term disability (LTD) not working status on December 13, 2004. Specifically, the grievant asserts that the agency improperly and unfairly failed to accommodate her and that such failure to accommodate led to her being placed into LTD non-working status. Further, the grievant alleges that the agency misapplied or unfairly applied the state's hiring policy. For the reasons discussed below, the grievance qualifies for hearing.

FACTS

Prior to her movement into LTD non-working, the grievant was employed as a Corrections Officer Senior with DOC. In August 2003 the grievant was placed on short-term disability (STD) due to a back problem.[1] The grievant remained in STD status until February 25, 2004, when she was moved into LTD working status. The grievant remained on LTD until March 2004 when her doctor released her to full duty with no restrictions. During this period from August 2003 to March 2004, the grievant was either out or working full-time with restrictions, which included no prolonged walking, stair climbing or lifting over of 20 pounds. DOC assigned the grievant to posts that were conducive to her needs. Such posts included: bottom floor control rooms, the central control room, the medical area, and the visiting room.

In August 2004, the grievant began experiencing problems with her back again. Accordingly, she was placed back in LTD working status.[2] Again, the grievant was able to work with restrictions. On December 3, 2004, the grievant underwent a procedure to relieve the pain in her back. The grievant was able to return to work following this procedure, however her doctor placed additional restrictions on her until she could be

[1] According to the grievant, she suffers from a permanent back condition that causes pain in her back.
[2] Under the Virginia Sickness and Disability Program (VSDP), if an employee is released to return to work full-time and is performing the full duties of the job, without any restrictions, and becomes disabled due to the same condition within 180 consecutive calendar days, the disability will be considered a continuation of the prior disability and the employee will be placed back in LTD status. *See* VSDP Handbook 2004, "Long-Term Disability," page 10.

seen for a follow-up appointment. On December 9, 2004, the grievant presented a note to DOC indicating her need for additional accommodations, specifically more frequent breaks and no driving. However, DOC determined on December 13, 2004 that it could no longer accommodate the grievant and moved her into LTD non-working status.

On December 21, 2004, the grievant was released by her doctor to return to work full-time with no restrictions. The agency however had already made its decision to place the grievant into LTD non-working status. On January 5, 2005, the grievant interviewed for a DOC position, but was not the successful candidate. Subsequently, the grievant initiated her January 14, 2005 grievance.

DISCUSSION

Access to the Grievance Procedure

Under the grievance procedure, employees "must have been employed by the Commonwealth at the time the grievance is initiated (unless the *action grieved* is a termination or involuntary separation)."[3] Thus, once an employee is separated from state employment, the only claim for which the employee has access to file a grievance and for which relief may be granted is a challenge to the separation. A separated employee does not have access to file a grievance for claims not directly related to his or her separation; and for that reason, such claims may not be qualified for hearing.

The Department of Human Resource Management (DHRM), the agency charged with implementation and interpretation of the Commonwealth's personnel policies, has stated that because an employee on LTD is not guaranteed reinstatement to her former position, it considers that employee "separated" from her position. As with any separated employee, an individual on LTD may use the grievance procedure to challenge her separation from state service (i.e., her placement into LTD), so long as she is not exempt from the Virginia Personnel Act (VPA) and was "a non-probationary employee of the Commonwealth at the time of the event that formed the basis of the dispute occurred." [4] In this case, the grievant was a non-probationary employee at the time she was moved into LTD (separated from employment) and she was not exempt from the VPA.

Accordingly, the grievant has access to the grievance process to challenge her movement into LTD non-working and any agency actions directly related to that move (e.g., the agency's decision to deny her request to work with restrictions). However, the grievant does not have access to the grievance process to challenge the agency's alleged misapplication or unfair application of the hiring policy because she was not employed by the Commonwealth at the time of the initiation of her January 14, 2005 grievance and the agency's application of the state's hiring policy does not involve, nor is it directly related to, her involuntary separation.

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[3] *Grievance Procedure Manual* § 2.3 (emphasis added).
[4] *Id.*

QUALIFICATION

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.[5]

The Equal Employment Opportunity Policy

DHRM Policy 2.05 "[p]rovides that all aspects of human resource management be conducted without regard to race, color, religion, gender, age, national origin, *disability*, or political affiliation . . . ."[6] Under Policy 2.05, "'disability' is defined in accordance with the Americans with Disabilities Act," the relevant law governing disability accommodations.[7] Like Policy 2.05, the Americans with Disabilities Act (ADA) prohibits employers from discriminating against a qualified individual with a disability on the basis of the individual's disability.[8] A qualified individual is defined as a person with a disability, who, with or without "reasonable accommodation," can perform the essential functions of the job.[9] An individual is "disabled" if she "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [has been] regarded as having such an impairment."[10] The "essential functions" are the "fundamental job duties of the employment position the individual with a disability holds or desires."[11]

I. Was the Grievant Disabled?

The initial inquiry is whether the grievant has a physical or mental impairment that substantially limits one or more of her major life activities. Through her VSDP claims and status reports as well as her statements, the grievant has presented evidence of a physical impairment. Thus, for purposes of this ruling only, we assume that the grievant has a physical impairment.

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[5] Va. Code § 2.2-3004(A)(ii); *Grievance Procedure Manual* § 4.1(b)(1).
[6] DHRM Policy 2.05, page 1 of 4 (emphasis added).
[7] 42 U.S.C. §§12101 *et seq.*
[8] It should be noted that DOC Procedure Number 5-54 provides "a process for employees and supervisors to implement Title I of the ADA and provide appropriate accommodations for 'qualified individuals with disabilities'."
[9] In defining whom the ADA covers and the duties of the employer, the Act does not distinguish between those persons whose disability resulted from a work-related injury versus other disabled individuals.
[10] 42 U.S.C. § 12102(2).
[11] Courts have considered a number of factors in determining what functions are essential. These factors include, but are not limited to, the employer's judgment regarding which functions are essential, the number of employees available among whom the performance of the functions can be distributed, the amount of time spent performing the functions, the consequences of not performing the function, and the actual work experience of past or current incumbents in the same or similar jobs. *See* 42 U.S.C. 12111(8); 29 C.F.R. 1630.2(n); Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D. Va. 1998).

The next question is whether her impairment substantially limits a major life activity.[12] To be "substantially limited" in a major life activity, the plaintiff must be significantly restricted in performing the activity.[13] In determining whether an impairment is substantially limiting, courts may consider the "nature and severity of the impairment," the "duration or expected duration of the impairment," and the "permanent or long term impact" of the impairment.[14] These factors indicate that a temporary impairment will generally not qualify as a disability under the ADA.[15] However, "[a]n intermittent manifestation of a disease must be judged the same way as all other potential disabilities."[16] Similarly, if an intermittent impairment is a characteristic manifestation of an admitted disability, it is considered a part of the underlying disability and a condition that the employer must reasonably accommodate.[17]

In this case, the grievant allegedly suffers from a permanent back problem that causes her intermittent pain. When the pain in her back manifests, the grievant may have difficulty climbing stairs, lifting in excess of 20 pounds and walking for prolonged periods of time. However, since her release by her doctor to work full-duty with no restrictions on December 21, 2004, the grievant claims that her back pain, which had substantially limited these activities, has not reoccurred.

In some cases, it may be readily apparent that an employee's impairment does not substantially limit a major life activity. In this particular case, however, the question of whether the grievant is substantially limited is a question of fact best determined by a hearing officer at hearing. Here, the complete extent of the grievant's impairment and the impact of that impairment on her daily life activities is not fully evident. As such, a hearing officer is generally better situated to determine whether the grievant is in fact "disabled" where it appears that the impairment is likely a manifestation of her underlying permanent back problem and evidently affects one major life activity (i.e., walking).

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[12] Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 CFR § 1630.2(i).
[13] Toyota Motor Mfg., Ky., Inc., v. Williams, 534 U.S. 184, 196-97, 122 S. Ct. 681, 691 (2002).
[14] *Pollard v. High's of Balt., Inc.* 281 F.3d 462, 467-468 (4th Cir. 2002); 29 C.F.R. § 1630.2(j)(2).
[15] *Pollard*, 281 F. 3d at 468. "An impairment simply cannot be a substantial limitation on a major life activity if it is expected to improve in a relatively short period of time." *Id.* The Pollard court noted, citing an earlier decision, that "it is evident that the term 'disability' does not include temporary medical conditions, even if those conditions require extended leaves of absence from work." *Pollard* at 468, 281 F. 3d (citing Halperin v. Abacus Tech. Corp., 128 F.3d 191, 199 (4th Cir. 1997)). In Pollard, where the plaintiff "was left with only the restrictions that she not lift more than twenty-five pounds or bend repetitively," the Court held that a "nine-month absence is insufficient to demonstrate that Pollard had a permanent or long-term impairment that significantly restricted a major life activity." *Pollard*, 281 F. 3d at 469-471.
[16] EEOC v. Sara Lee Corporation, 237 F.3d 349 (4th Cir. 2001).
[17] *See* Vande Zande v. State of Wisconsin Department of Administration, 44 F.3d 538 (7th Cir. 1995).

II. Did the Agency Reasonably Accommodate the Grievant?

If an employee is disabled under the ADA, an employer must make "reasonable accommodations" unless the employer can demonstrate that the accommodation "would impose an undue hardship on the operation of the business [or government]."[18] Under the ADA, job restructuring, part-time or modified work schedules, reassignment and "other similar accommodations for individuals with disabilities" are considered reasonable accommodations.[19] However, courts have recognized that an accommodation is unreasonable if it requires the elimination of an "essential function."[20] In determining what functions of the job are essential, due consideration shall be given to the employer's judgment.[21] DOC has designated the ability to work all posts an essential function of the corrections officer position.[22]

In this case, it appears the agency initially accommodated the grievant's restrictions. Specifically, from August 2003 to March 2004 and again from August 2004 to December 2004, the grievant was assigned to work posts that required the least amount of prolonged walking, stair climbing and lifting. However, once the grievant was placed on additional restrictions (frequent breaks and no driving), the agency informed the grievant on December 13, 2004 that it could not accommodate her restrictions and she would be placed in LTD non-working status. In his second step response, the facility warden states that DOC's Return to Work Program allows for accommodations for 90 days or less[23] and that the grievant's additional restrictions warranting accommodations outside of this 90 day period necessitated its decision to place her on LTD not working. As such, there appears to be a question as to whether the agency attempted to reasonably accommodate the grievant or merely separated her due to the expiration of the 90-day timeframe.[24] Such questions of fact are best left to the determination of a hearing officer. Likewise, whether a task is considered an essential function of the job and whether a reasonable accommodation would enable the disabled employee to perform the essential functions of a job are fact-specific inquiries and best left to the determination of a hearing officer at hearing.[25]

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[18] 42 U.S.C. § 12112(b)(5)(A).
[19] 42 U.S.C. § 12111(9)(B).
[20] Hill v. Harper, 6 F. Supp.2d 540, 543 (E.D.Va. 1998)(citing Hall v. U.S. Postal Service, 857 F.2d 1073, 1079 (6th Cir. 1988)).
[21] 42 U.S.C. § 12111(8).
[22] *See* DOC Procedure Number 5-54.11(D)(9).
[23] DOC Procedure Number 5-52 establishes "procedures for temporary adjustments to work assignments for employees suffering a short-term impairment." DOC Procedure Number 5-52.1. Generally, "adjusted work assignments shall not exceed ninety (90) calendar days." DOC Procedure Number 5-52.10.
[24] It should be noted that this Department's decision merely establishes that a question of fact exists as to whether the agency attempted to reasonably accommodate the grievant for purposes of DHRM Policy 2.05, and expresses no opinion on the content of DOC's Return to Work policy or program.
[25] *See* Hill v. Harper, 6 F.Supp.2d at 543 (E.D.Va. 1998).

Accordingly, the issue of misapplication of EEO Policy 2.05 is qualified for hearing for a determination of (i) whether, at the time of the agency's December 2004 decision to deny the grievant's request for accommodation, the grievant was "disabled" as defined under DHRM Policy 2.05 and the ADA; and if so, (ii) whether the agency failed to provide reasonable accommodation.

Virginia Sickness and Disability Program (VSDP)

Chief among the applicable policies in this case is the Virginia Sickness and Disability Program (VSDP), various aspects of which are governed by two state agencies, the Virginia Retirement System Board of Trustees (VRS) and the Department of Human Resource Management (DHRM).[26] VRS's VSDP Handbook for employees states that VSDP's ultimate goal "is to return you to gainful employment when you are medically able."[27] The VSDP Handbook further states that "Your employer is encouraged, under the program, to provide reasonable accommodations for disabled employees. Unum Provident will work with you, your employer and your licensed treating professional to coordinate your return to employment."[28] In an administrative review decision dated February 16, 2005, DHRM, the agency charged with promulgation and interpretation of state policy, declared:

> While VSDP does not guarantee that an agency will hire an employee back after a period of being on LTD, in accordance with VSDP's overriding mission, it would appear that an agency must not disregard VSDP's important goal of returning employees to work from periods of disability unless it would create an undue hardship for the agency.

As noted above, for an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Here, there remains a question of whether the agency failed to reasonably accommodate the grievant and if so, whether such failure is tantamount to a disregard of the intent of the VSDP policy. Moreover, given that this grievance has been qualified on the issue of misapplication/unfair application of the EEO policy, it simply makes sense to send the issue of misapplication/unfair application of the VSDP policy to hearing as well for a fuller exploration of the facts and applicable policies.

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[26] As provided in VRS's Virginia Sickness and Disability Program Handbook, VRS "by law, has been given the authority to develop, implement and administer the VSDP. However, the authority granted is not intended to supercede the final authority of the Director of the Department of Human Resource Management to develop and interpret leave and related personnel policies and procedures associated with VSDP." VSDP Handbook 2004, "Authority and Interpretation," page 30.

[27] VSDP Handbook 2004, "Objective of Program," page 4.

[28] VSDP Handbook 2004, "Long-Term Disability," page 11. Compare DHRM Policy 4.30 (Leave Policies – General Provisions) at III(C), page 2 of 4 ("[w]hen practicable, and for as long as the agency's operations are not affected adversely, an agency should attempt to approve an employee's request for leave of absence for the time requested by the employee").

CONCLUSION

The grievant's January 14, 2005 grievance is qualified for hearing. This qualification ruling in no way determines that the agency's actions were discriminatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

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Claudia T. Farr
Director

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